MOTION FILED

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No. 04-1021

In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Petitioner,

v.

COMMUNITIES FOR EQUITY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE BASKETBALL COACHES ASSOCIATION OF MICHIGAN, INC. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the Basketball Coaches Association of Michigan, Inc. respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of Petitioner Michigan High School Athletic Association. Consent to the filing of this brief has been granted by counsel for Petitioner, and has been lodged with the Clerk of this Court. Respondents have withheld consent, necessitating the filing of this motion.

Founded in 1976, *amicus* is a non-profit corporation organized under the laws of the State of Michigan and committed to the development of student athletes, professionalism in interscholastic athletics, sportsmanship, and the growth of the sport of basketball. *Amicus* submits this brief because every high school basketball coach in the State of Michigan has been and will continue to be directly and substantially impacted by the lower courts' rulings with respect to the scheduling of the boys' and girls' basketball seasons.

Amicus urges this Court to grant certiorari. The District Court and the Sixth Circuit incorrectly concluded that gender-neutral scheduling decisions constituted facial gender classifications subject to intermediate scrutiny. The lower courts' decisions will adversely impact all of the stakeholders in interscholastic athletics, and will subject many basketball coaches to the threat of litigation based on the personal decisions that those coaches may make with respect to which gender-specific team they will coach in the wake of the District Court's order to realign the girls' and boys' basketball seasons.

Because of the unique perspective that basketball coaches have with respect to the scheduling of those seasons, *amicus* believes that the attached brief will aid this

Court in considering the petition. *Amicus* believes that it can add insight as to why it is important for this Court to grant the petition and respectfully requests that this motion to file a brief *amicus curiae* be granted.

Dated: March 31, 2005 Respectfully submitted,

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QUESTION PRESENTED

Amicus will address the following question, which is framed as Question 1 in the petition for a writ of certiorari:[1]

> Whether the Sixth Circuit erred by holding, in conflict with decisions of this Court and the Third, Fourth, Eighth and D.C. Circuits, that differences in the implementation of constitutionally authorized single-sex programs must be characterized as presumptively unconstitutional gender classifications subject to intermediate scrutiny.

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[1] *Amicus* unequivocally supports the Petitioner's second basis for requesting certiorari. *Amicus* believes, however, that the first question presented impacts it and its members more directly and substantially and, accordingly, has elected to confine its presentation to that question alone.

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INTEREST OF AMICUS CURIAE

The Basketball Coaches Association of Michigan, Inc. ("BCAM") respectfully submits this brief *amicus curiae* pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States.[2] BCAM is a non-profit corporation organized under the laws of the State of Michigan and committed to the development of student athletes, professionalism in interscholastic athletics, sportsmanship, and the growth of the sport of basketball. BCAM submits this brief because its members, approximately 2,400 middle school and high school basketball coaches throughout the State of Michigan, have been and will continue to be directly and substantially impacted by the lower courts' rulings with respect to the scheduling of the boys' and girls' basketball seasons.

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[2] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, BCAM states that no counsel for any party authored this brief in whole or in part, and no person or entity other than BCAM and its counsel made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Citing this Court's decision in *United States v. Virginia*, 518 U.S. 515 (1996) ("*VMI*"), the lower courts incorrectly treated gender-neutral scheduling decisions as facial gender classifications and accordingly held that the sports scheduling system served by Petitioner Michigan High School Athletic Association ("MHSAA") denied female athletes equal protection of the laws. However, the lower courts ignored the fact that the challenged scheduling decisions themselves are not based on an athlete's gender, but are based instead on, among other factors, practical, logistical concerns with respect to limited facilities and the interest of maximizing participation in interscholastic athletics for all students. Because both the District Court and the Sixth Circuit concluded that MHSAA's scheduling system constituted a facial gender classification, the Plaintiffs in this case were not required to prove that the scheduling decisions of Michigan school administrators and coaches were motivated by a discriminatory animus or that the athletic programs available to female student-athletes were not substantially equal in the aggregate. In fact, neither the District Court nor the Sixth Circuit analyzed the extent to which, if at all, these scheduling decisions were based on gender. Each analyzed only the disparate effects of the scheduling decisions on the ability of a select few female student-athletes to obtain individual benefits, such as national ranking on All-American lists, media attention and college scholarships, each of which has nothing whatsoever to do with the purpose underlying participation in high school sports. And, by treating any decision between male and female athletic programs as presumptively unconstitutional, the lower courts have created a situation in which every decision made by school administrators, athletic directors, athletic conferences,

coaches and officials that affects single-sex athletic teams could be the subject of equal protection litigation.

Further, playing basketball in the fall is not meaningfully disadvantageous to female student-athletes. To the contrary, evidence adduced at trial established several advantages to the fall basketball season, and the realignment of the basketball seasons as mandated by the District Court and affirmed by the Sixth Circuit will do nothing to create a more advantageous condition for those athletes. BCAM submits that, had the lower courts properly applied this Court's equal protection jurisprudence, such evidence would have been sufficient to withstand Plaintiffs' equal protection challenge.

BCAM submits that the MHSAA's petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

ARGUMENT

At the outset, BCAM notes its firm institutional belief that interscholastic team athletics exist only to supplement the educational experience by instilling in student-athletes an appreciation for, among other things, teamwork, responsibility and personal discipline. BCAM submits that interscholastic athletics do not exist to exult individual achievement or to enhance the ability of any single athlete to obtain personal attention or athletic scholarships. Instead, interscholastic athletics—the vast majority of the participants in which will never play intercollegiate athletics, let alone receive an athletic scholarship—exist to promote the growth and betterment of student-athletes such that they will carry forward into their adult lives the core values instilled in them through athletic competition. Throughout this litigation, BCAM and its member co[illegible]ies have become increasingly concerned with the emphasis placed upon scheduling sports seasons in such a way as to maximize the non-interscholastic athletic opportunities, and ostensible college recruitment advantages, for *individual athletes* as opposed to athletic *teams*. The trial court's focus on the "impact" of Michigan's current athletic scheduling system on female student-athletes' opportunities for individual achievement is anathema to the mission of high school interscholastic sports to maximize participation for all students—boys and girls alike.

Had the trial court correctly imposed upon Plaintiffs the burden of proving that the MHSAA's current scheduling system was either motivated by discriminatory animus or that the subject athletic programs were, overall, not substantially equal, BCAM submits that, based on the evidence that MHSAA presented and which is more fully described in MHSAA's Petition for Writ of Certiorari, MHSAA would have prevailed in the litigation. The

current scheduling system represents the product of historical and careful balancing of the interests of all of the stakeholders in interscholastic athletics—students, student-athletes, parents, coaches, officials, school administrators and even fans—after giving due consideration to the resources necessary and available to sponsor athletic events.

Michigan's current athletic scheduling system may not be perfect, and it may not provide Michigan girls with the mirror-image of the basketball experience that boys or girls in other states are afforded. However, it does satisfy this Court's established standards of equal protection of the laws.

I. The District Court and the Sixth Circuit incorrectly treated gender-neutral scheduling decisions as facial gender classifications, contrary to this Court's precedent and in direct conflict with other Circuit Courts of Appeal.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This Court's precedents instruct, however, that the Equal Protection Clause does not guarantee that every aspect of a service or benefit conferred by the state will be equal in all respects. Rather, equal protection guarantees only an equal opportunity to receive such service or benefit. In the aggregate, the scheduling of girls' high school athletics in Michigan provides girls with equal opportunity and equal access to the benefits derived from participation in such activities, which BCAM submits are the "life-skills" that are honed in part through athletic competition—teamwork, cooperation, and personal discipline and responsibility.

The District Court and the Sixth Circuit did not address the question of whether Michigan's current athletic scheduling system denies Michigan girls these fundamental benefits of interscholastic competition. Instead, each focused only on whether the scheduling system denied girls the opportunity to receive certain individual benefits that are totally unrelated to the benefit that MHSAA and its member schools provide, which is the opportunity to participate in school sports. Both the District Court and the Sixth Circuit ultimately concluded that the scheduling system was facially discriminatory because of the impact that it has on certain individuals' ability to receive those personal benefits.

In *VMI*, this Court found that the Virginia Military Institute's all-male admissions policy denied women the opportunity to obtain the "unique educational benefit" that VMI offered to males. *VMI*, 518 U.S. at 540. VMI's all-male admissions policy was undeniably facially discriminatory; men were admitted to a one-of-a-kind military college, and women were not. Women were denied the opportunity to receive the benefit of an educational model that was "not available anywhere else in Virginia." *VMI*, 518 U.S. at 520. The Court also determined that Virginia's proposed "parallel" program, the Virginia Women's Institute for Leadership ("VWIL"), was different in, most notably, its educational and degree offerings. *VMI*, 518 U.S. at 526. VWIL did not even offer courses, let alone degrees, in engineering or advanced math and physics courses. This Court further found that the military training offered by VWIL employed an altogether different educational method than VMI–cooperative as opposed to adversative—and offered no opportunity for women to experience the unique and rigorous military training which *only* VMI could offer. *VMI*, 518 U.S. at 548.

Simply put, VMI's admissions policy denied women the essential benefits that it provided to men, and therefore denied them equal protection of the laws.

By contrast, the scheduling of a sports season is not facially discriminatory. As is set forth below, the decision to have separate teams for boys and girls in the first instance inevitably leads to the result that the players on those teams will be treated differently. However, the fact remains that boys and girls alike have the equal opportunity to receive the essential benefit of interscholastic competition—specifically, the opportunity to participate in team sports and carry forward the core values of such competition into their adult lives. The opportunity to receive these benefits is wholly unaffected by the specific period of time during a calendar year in which the sport is played. However, without any regard to the purpose underlying interscholastic athletic competition, the Sixth Circuit, relying on *VMI*, affirmed the District Court's finding that Michigan's current sports scheduling system was facially discriminatory. Neither court, however, found, as this Court found in *VMI*, that the scheduling of girls' athletic seasons denies them the essential benefits of interscholastic competition, and Plaintiffs do not even assert that it does. Rather, Plaintiffs cite, and the District Court and Sixth Circuit focused solely upon, the allegedly "disadvantageous" impact of athletic participation at certain times during a calendar year, rather than athletic participation in the first instance, for the proposition that Michigan's sports scheduling system denies them equal protection. Interscholastic athletics do not exist to provide any individual athlete—male or female—with special "perks" or attention, publicity, individual awards or college scholarships, all of which are nothing more than byproducts of the interscholastic athletic experience.

Because the District Court and Sixth Circuit found that Michigan's current sports scheduling system was facially discriminatory, Plaintiffs were not required to prove that such system was driven by gender animus. However, because this case presents only an issue of disparate impact, this Court's precedent requires that Plaintiffs prove precisely that. In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), this Court addressed a challenge to the Massachusetts veterans preference statute, which required that veterans who qualified for state civil service positions be considered for appointment before non-veterans. The lower court had granted injunctive relief in favor of the plaintiffs because it found that the "absolute preference afforded...to veterans has a devastating impact upon the employment opportunities to women." *Feeney*, 442 U.S. at 260. The lower court had also found that the hiring preference was "nonneutral" because of the impact that it had on women, e.g., that because women had traditionally not served in the armed forces, they were excluded from the class of veterans that would receive the preference. This Court reversed, recognizing, among other things, that "the equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification." *Feeney*, 442 U.S. at 271; *citing Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). This Court further recognized that "[w]hen the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Feeney*, 442 U.S. at 271; *citing New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979). And, where a neutral law has a "disproportionately adverse effect...it is unconstitutional *only if that impact can be traced to a discriminatory purpose*." *Feeney*, 442 U.S. at 272 (emphasis supplied);

citing Washington v. Davis, 426 U.S. 229 (1976) (holding that disproportionate impact, standing alone, does not constitute unconstitutional discrimination). This is precisely the standard to which Plaintiffs in this case should have been held but were not.

The classification of boys and girls into separate teams is rationally based. In fact, the legitimacy of such classifications, specifically with respect to the sport of basketball, has long been recognized by this Court. In *O'Connor v. Board of Education of School District 23*, 449 U.S. 1301 (1980), Justice Stevens, sitting as a Circuit Justice, held that:

> It seems to me that there can be little question about the validity of the classification in most of its normal applications. Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events.

O'Connor, 449 U.S. at 1307; *see also Cape v. Tennessee Secondary Schools Athletic Association*, 563 F.2d 793 (6th Cir. 1977) (finding that without gender-separated teams, girls effectively could not participate in athletics). The scheduling of athletic competition within the framework of gender-specific teams works nothing more than a purportedly uneven effect within the gender-based classification. Because scheduling decisions themselves have nothing to do with an athlete's gender, the inquiry into the constitutionality of such scheduling decisions must necessarily begin with an inquiry into the existence of a discriminatory purpose underlying such decisions. The District Court and the Sixth Circuit failed to so inquire.

Once a decision is made to have gender-separate teams, it must be acknowledged that school personnel must have the flexibility within the confines of the Equal Protection Clause to decide to sponsor the same sports in different seasons to maximize the availability to all students—boys and girls alike—of limited facilities.[3] MHSAA's member schools have not chosen these particular schedules because of gender, but rather because of coaching and facilities shortages, a desire to increase the overall participation and profile of girls' athletics, and other practical problems incidental to the only real gender classification at work in this case: the decision to have separate teams. Standing alone, therefore, the decision to have separate seasons cannot be said to constitute discrimination under the Equal Protection Clause, notwithstanding any perceived or alleged disparate impact upon a particular gender. *Feeney*, 442 U.S. at 279.

The lower courts' ruling ignores the fact that, because school districts in the State of Michigan maintain separate teams for boys and girls, certain aspects of the athletic experience will necessarily be different. The lower courts' rulings further offer no guidance on what differences would pass constitutional muster and what would not. If the lower courts' application of the law is correct, school administrators and athletic directors, and likely coaches themselves, will be exposed to potential equal protection claims under the Court-ordered realignment plan, simply by virtue of having to choose which team a particular coach will coach, or which game a particular referee will

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[3] In fact, the District Court correctly recognized that "[e]nsuring the greatest number of participation opportunities for children in interscholastic sports is a legally legitimate goal, as well as wise policy." *Communities for Equity, et al. v. Michigan High School Athletic Association*, 178 F. Supp. 2d 805 (W.D.Mich. 2001) ("CFE").

officiate. The following hypothetical situations illustrate this concern:

- Over three hundred Michigan basketball coaches presently coach both boys' and girls' teams. These coaches, in close consultation with their school's athletic director, will be forced to choose which gender-based team to coach. Accordingly, half of the athletes that they presently coach will have to adjust to a different coach, who may very likely be less experienced and less qualified than the present coach. If an experienced and accomplished coach opts to coach boys' basketball in the winter, thus causing that coach's former girls' basketball team to thereafter be coached by a less experienced and/or less qualified coach, the school district and the coach have violated 42 U.S.C. § 1983 by denying the female student-athletes equal protection because they no longer have the benefit of that coach's experience and expertise. Further, the school district and the coach would have the burden of proving an "exceedingly persuasive justification" for what is ultimately the coach's personal decision to coach the boys' team rather than the girls' team.
- With simultaneous seasons, the number of basketball games played in any given week will double. While it is possible that a sufficient number of new officials could be trained, it is undeniable they will not have the depth and breadth of officiating experience that the existing officials do. Athletic directors and "assignors" designated by officiating associations and athletic conferences are

> responsible for assigning referees to officiate particular games. If an inexperienced referee is assigned to officiate a girls' basketball game and the game is lost because of an egregious "bad call" made by the inexperienced referee, then the athletic director, the school district that employs her or him, the assignor, the officiating association and the athletic conference that participated in assigning the official to that game have violated 42 U.S.C. § 1983 by denying the student-athletes on the losing team equal protection because those student-athletes have not been afforded the benefit of referees that are sufficiently experienced and qualified.

Reduced to its core, Plaintiffs' equal protection claim is premised upon the expectation that the interscholastic athletic opportunities available to young women should mirror those available to young men. Consistent with this Court's equal protection jurisprudence, Plaintiffs have no legal entitlement to same. And, consistent with practical reality, same is simply impossible.

Finally, Plaintiffs in this case have never proven, or even alleged, that Michigan's athletic offerings to girls and boys are unequal overall. Therefore, since Michigan girls are provided with an equal opportunity to compete, it cannot be said that the current scheduling of sports seasons constitutes a denial of equal protection. *Feeney,* 442 U.S. at 273 (holding that the Fourteenth Amendment guarantees equal opportunities, not equal results). Because Michigan girls' opportunities to participate in interscholastic athletics have not been proven to be "unequal" to those of Michigan boys, it cannot be said that MHSAA has denied the Plaintiffs equal protection.

II. In any event, playing basketball in the fall is not meaningfully disadvantageous to female student-athletes.

Plaintiffs argued, and the District Court found, that girls playing basketball in the fall are disadvantaged because:

- they do not have the opportunity to participate in special events for professional or semi-professional teams, or in national "shoot-outs" such as the Nike and Blue Star shootouts;
- they "do not get to participate in 'March Madness' or the excitement and publicity surrounding this time period;"
- they must play one game a week on Thursday (a school night) to avoid conflicting with football, although that game could be played on Fridays in the winter;
- they are less likely to make the Parade All-American lists that come out in March, because they have been "forgotten;"

CFE, 178 F. Supp. 2d at 818-820. It is significant that the perceived harms described above have nothing to do with the properly understood scope of interscholastic athletic programs. Rather, they represent incidental outcomes that some individual athletes may desire, and in fact receive, from the interscholastic basketball experience, and moving the basketball season to the winter will not put those athletes in a more advantageous position than if they continued to play in the fall.

Teams coached by BCAM members have been invited to play before the Women's National Basketball Association's Detroit Shock professional basketball games

in the late summer and early fall. Further, girls coached by BCAM members have participated in both the Nike and Blue Star shootouts. Playing interscholastic basketball in the fall should not have any effect on their participation, except insofar as it imposes yet another choice for a player and her parents to make with respect to the constant, delicate balance between academics and other social and extracurricular activities.

Further, Michigan girls participate in fall tournament play, colloquially known as "December Dreams." Not only is this tournament experience operationally and functionally identical to the March boys' tournament experience, BCAM submits that moving the girls' season to the fall would actually *limit* the media exposure to the girls' tournament. As the seasons are presently aligned, the sports media—e.g., television, radio, and print media—have more available column space and air time to provide media coverage to the fall girls' tournament. Simply put, the girls' fall tournament does not presently "compete" for media exposure with men's and women's professional basketball, the NCAA men's basketball tournament, and the NCAA women's basketball tournament, which it would if the seasons were re-aligned in accordance with the lower courts' orders. BCAM believes that female high school basketball players would receive less attention as a result, and neither this Court, the Sixth Circuit, the District Court, nor any party to this litigation can compel a newspaper or broadcast station to devote column space or air time to any basketball tournament.

BCAM's belief that girls' basketball players would receive less media attention if that season were held in the spring is not unique. In fact, in *Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association*, 558 F. Supp. 487 (D.D.C. 1983), the

United States District Court for the District of Columbia quoted one of Plaintiffs' experts in this litigation, Dr. Donna Lopiano, as follows:

> Although our society's sex stereotypical values are changing, there is little question that the average spectator *and the commercial interests catering to his or her desires*, still view strength, aggression and competition as unbecoming to the fairer sex or at the very least, not something to go out of one's way to observe on a regular basis...*Men's athletics is fully developed and very appealing in a commercial sense.* Women's athletics is unrefined, unfinished and in the dark ages by comparison.

Association for Intercollegiate Athletics for Women, 558 F. Supp. at 496 (emphasis supplied). BCAM submits that, while admittedly inequitable, the practical reality of commercial media enterprises is such that girls' high school basketball coverage will take a media-imposed "back seat" to the NBA, WNBA, NCAA men's and women's basketball, and high school boys' basketball if the girls' season is moved to the winter. BCAM further submits that this is not a circumstance or consequence for which any person or entity other than the media outlets and their consumers can be held accountable.

Further, BCAM submits that simply moving girls' basketball to the winter will not alleviate the scheduling conflicts that are inherent in Friday night activities. It is not the mere fact that football games are played on Friday nights that inhibits the feasibility of girls' basketball being played on Friday nights. Rather, each school event, be it a band or orchestra concert, drama production, or athletic contest, requires the presence of school personnel to

operate the infrastructure, be it an auditorium, stadium, or gymnasium. Whether girls' basketball must be scheduled in conjunction with football in the fall or boys' basketball in the winter, the same pressures will be placed on the schools' resources. There is no scheduling "formula" that will alleviate this problem.

Finally, the focus on the likelihood that a player will or will not make the Parade All-American list is troublesome to BCAM for several reasons. First of all, the list includes only one or two players from any given state. If a player is so preeminent as to be included on such a list, that player will not be "forgotten." Secondly, as is set forth elsewhere in this brief, BCAM does not believe that decisions regarding interscholastic athletics should be driven by the consideration that a particular action *might* impact one or two individuals on an annual basis, especially when it has a corresponding adverse impact on hundreds, if not thousands, of other individuals. Causing many to suffer so that a chosen few can receive purely individual attention or benefits is inconsistent with the overriding emphasis of interscholastic athletics upon team competition and accomplishment.

Playing basketball in the fall does not work a disadvantage to Michigan girls. Even if some adverse impact were established, same would not have been found to rise to the level of a denial of equal protection had the lower courts applied the correct analysis.

CONCLUSION

For the reasons set forth above, BCAM submits that the petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

Dated: March 31, 2005

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